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ENVIRONMENTAL PROTECTION AGENCY

[FRL-9497-8]

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, Section 128(a); Notice of Grant Funding Guidance for State and Tribal Response Programs for FY2012

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) will begin to accept requests, from December 1, 2011 through January 31, 2012, for grants to supplement State and Tribal Response Programs. This notice provides guidance on eligibility for funding, use of funding, grant mechanisms and process for awarding funding, the allocation system for distribution of funding, and terms and reporting under these grants. EPA has consulted with state and tribal officials in developing this guidance.

The primary goal of this funding is to ensure that state and tribal response programs include, or are taking reasonable steps to include, certain elements and a public record. Another goal is to provide funding for other activities that increase the number of response actions conducted or overseen by a state or tribal response program. This funding is not intended to supplant current state or tribal funding for their response programs. Instead, it is to supplement their funding to increase their response capacity.

For fiscal year 2012, EPA will consider funding requests up to a maximum of \$1.2 million per state or tribe. Subject to the availability of funds, EPA regional personnel will be available to provide technical assistance to states and tribes as they apply for and carry out these grants.

DATES: This action is effective as of December 1, 2011. EPA expects to make non-competitive grant awards to states and tribes which apply during fiscal year 2012.

ADDRESSES: Mailing addresses for U.S. EPA Regional Offices and U.S. EPA Headquarters can be located at www.epa.gov/brownfields.

FOR FURTHER INFORMATION CONTACT: The U.S. EPA's Office of Solid Waste and Emergency Response, Office of Brownfields and Land Revitalization, (202) 566-2892.

SUPPLEMENTARY INFORMATION:

I. GENERAL INFORMATION

Section 128(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, authorizes a noncompetitive \$50 million grant program to establish and enhance state¹ and tribal² response programs. CERCLA 128(a) response program grants are funded with “categorical” State and Tribal Assistance Grant (STAG) appropriations. Section 128(a) cooperative agreements are awarded and administered by the U.S. Environmental Protection Agency (EPA) regional offices. Generally, these response programs address the assessment, cleanup, and redevelopment of brownfields sites and other sites with actual or perceived contamination. This document provides guidance that will enable states and tribes to

¹The term "state" is defined in this document as defined in CERCLA section 101(27).

²The term "Indian tribe" is defined in this document as it is defined in CERCLA section 101(36). Intertribal consortia, as defined in the Federal Register Notice at 67 FR 67181, Nov. 4, 2002, are also eligible for funding under CERCLA section 128(a).

apply for and use Fiscal Year 2012 section 128(a) funds³.

The Catalogue of Federal Domestic Assistance entry for the section 128(a) State and Tribal Response Program cooperative agreements is 66.817. This grant program is eligible to be included in state and tribal Performance Partnership Grants under 40 CFR Part 35 Subparts A and B, with the exception of funds used to capitalize a revolving loan fund for brownfield remediation under section 104(k)(3); or purchase insurance or develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State or Tribal response program.

Requests for funding will be accepted from December 1, 2011, through January 31, 2012.

Requests EPA receives after January 31, 2012, will not be considered for FY2012 funding.

Information that must be submitted with the funding request is listed in Section IX of this guidance. States or tribes that do not submit the request in the appropriate manner may forfeit their ability to receive funds. First time requestors are strongly encouraged to contact their Regional EPA Brownfields contacts, listed on the last page of this guidance, prior to submitting their funding request.

Requests submitted by the January 31, 2012, request deadline are preliminary; final cooperative agreement work plans and budgets will be negotiated with the regional offices once final funding allocation determinations are made. As in previous years, EPA will place special emphasis on reviewing a cooperative agreement recipient's use of prior section 128(a) funding in making allocation decisions and unexpended balances are subject to 40 CFR 35.118 and 40 CFR 35.518 to the extent consistent with this guidance

States and tribes requesting funds are required to provide a Dun and Bradstreet Data Universal

³ The Agency may waive any provision of this guidance that is not required by statute, regulation, Executive Order or overriding Agency policies.

Numbering System (DUNS) number with their cooperative agreement's final package. For more information, please go to www.grants.gov.

II. BACKGROUND

State and tribal response programs oversee assessment and cleanup activities at the majority of brownfields sites across the country. The depth and breadth of state and tribal response programs vary. Some focus on CERCLA related activities, while others are multi-faceted, for example, addressing sites regulated by both CERCLA and the Resource Conservation and Recovery Act (RCRA). Many state programs also offer accompanying financial incentive programs to spur cleanup and redevelopment. In passing section 128(a)⁴ Congress recognized the accomplishments of state and tribal response programs in cleaning up and redeveloping brownfields sites. Section 128(a) also provides EPA with an opportunity to strengthen its partnership with states and tribes.

The primary goal of this funding is to ensure that state and tribal response programs include, or are taking reasonable steps to include, certain elements, and establish and maintain a public record. The secondary goal is to provide funding for other activities that increase the number of response actions conducted or overseen by a state or tribal response program. This funding is not intended to supplant current state or tribal funding for their response programs. Instead, it is to supplement their funding to increase their response program's capacity.

Subject to the availability of funds, EPA regional personnel will be available to provide technical assistance to states and tribes as they apply for and carry out section 128(a) cooperative agreements.

⁴Section 128(a) was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act (Brownfield Amendments).

Subject to the availability of funds, EPA regional personnel will be available to provide technical assistance to states and tribes as they apply for and carry out Section 128(a) cooperative agreements.

III. ELIGIBILITY FOR FUNDING

To be eligible for funding under CERCLA section 128(a), a state or tribe must:

1. demonstrate that its response program includes, or is taking reasonable steps to include, the four elements of a response program, described in Section V of this guidance; or be a party to voluntary response program Memorandum of Agreement (VRP MOA)⁵ with EPA;

AND
2. maintain and make available to the public a record of sites at which response actions have been completed in the previous year and are planned to be addressed in the upcoming year, see CERCLA section 128(b)(1)(C).

IV. MATCHING FUNDS/COST-SHARE

States and tribes are not required to provide matching funds for cooperative agreements awarded under section 128(a), with the exception of the section 128(a) funds a state or tribe uses to capitalize a Brownfields Revolving Loan Fund under CERCLA section 104(k)(3).

V. THE FOUR ELEMENTS - SECTION 128(a)

⁵ States or tribes that are parties to VRP MOAs and that maintain and make available a public record are automatically eligible for section 128(a) funding.

Section 128(a) recipients that do not have a VRP MOA with EPA must demonstrate that their response program includes, or is taking reasonable steps to include, the four elements.

Achievement of the four elements should be viewed as a priority. Section 128(a) authorizes funding for activities necessary to establish and enhance the four elements, and to establish and maintain the public record requirement.

The four elements of a response program are described below:

1. *Timely survey and inventory of brownfields sites in state or tribal land.* EPA's goal in funding activities under this element is to enable the state or tribe to establish or enhance a system or process that will provide a reasonable estimate of the number, likely locations, and the general characteristics of brownfields sites in their state or tribal lands. EPA recognizes the varied scope of state and tribal response programs and will not require states and tribes to develop a "list" of brownfields sites. However, at a minimum, the state or tribe should develop and/or maintain a system or process that can provide a reasonable estimate of the number, likely location, and general characteristics of brownfields sites within their state or tribal lands. Inventories should evolve to a prioritization of sites based on community needs, planning priorities, and protection of human health and the environment.

Given funding limitations, EPA will negotiate work plans with states and tribes to achieve this goal efficiently and effectively, and within a realistic time frame. For example, many of EPA's Brownfields Assessment cooperative agreement recipients conduct inventories of brownfields sites in their communities or jurisdictions. EPA encourages states and tribes to work with these cooperative agreement recipients to obtain the information that they have gathered and include it in their survey and

inventory.

2. *Oversight and enforcement authorities or other mechanisms and resources.* EPA's goal in funding activities under this element is to have state and tribal response programs that include oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that:

- a. a response action will protect human health and the environment, and be conducted in accordance with applicable laws; and
- b. the state or tribe will complete the necessary response activities if the person conducting the response activities fails to complete the necessary response activities (this includes operation and maintenance and/or long-term monitoring activities).

3. *Mechanisms and resources to provide meaningful opportunities for public participation.*⁶ EPA's goal in funding activities under this element is to have states and tribes include in their response program mechanisms and resources for meaningful public participation, at the local level, including, at a minimum:

- a. public access to documents and related materials that a state, tribe, or party conducting the cleanup is relying on or developing in making cleanup decisions or conducting site activities;
- b. prior notice and opportunity for meaningful public comment on cleanup plans and site activities including the input into the prioritization of sites; and
- c. a mechanism by which a person who is, or may be, affected by a release or

⁶States and tribes establishing this element may find useful information on public participation on EPA's community involvement web site at <http://www.epa.gov/superfund/community/policies.htm>.

threatened release of a hazardous substance, pollutant, or contaminant at a brownfields site — located in the community in which the person works or resides — may request that a site assessment be conducted. The appropriate state or tribal official must consider this request and appropriately respond.

4. *Mechanisms for approval of a cleanup plan, and verification and certification that cleanup is complete.* EPA's goal in funding activities under this element is to have states and tribes include in their response program mechanisms to approve cleanup plans and to verify that response actions are complete, including a requirement for certification or similar documentation from the state, the tribe, or a licensed site professional that the response action is complete. Written approval by a state or tribal response program official of a proposed cleanup plan is an example of an approval mechanism.

VI. PUBLIC RECORD REQUIREMENT

In order to be eligible for section 128(a) funding, states and tribes (including those with MOAs) must establish and maintain a public record system, described below, in order to receive funds. Specifically, under section 128(b)(1)(C), states and tribes must:

1. maintain and update, at least annually or more often as appropriate, a record of sites that includes the name and location of sites at which response actions have been completed during the previous year;
2. maintain and update, at least annually or more often as appropriate, a record of sites that includes the name and location of sites at which response actions are planned to be addressed in the next year; and

3. identify in the public record whether or not the site, upon completion of the response action, will be suitable for unrestricted use. If not, the public record must identify the institutional controls relied on in the remedy and include relevant information concerning the entity that will be responsible for oversight, monitoring, and/or maintenance of the institutional and engineering controls.

Section 128(a) funds may be used to maintain and make available a public record system that meets the requirements discussed above.

A. Distinguishing the “survey and inventory” element from the “public record”

It is important to note that the public record requirement differs from the "timely survey and inventory" element described in the “Four Elements” section above. The public record addresses sites at which response actions have been completed in the previous year and are planned to be addressed in the upcoming year. In contrast, the "timely survey and inventory" element, described above, refers to identifying brownfields sites regardless of planned or completed actions there.

B. Making the public record easily accessible

EPA’s goal is to enable states and tribes to make the public record and other information, such as information from the “survey and inventory” element, easily accessible. For this reason, EPA will allow states and tribes to use section 128(a) funding to make the public record, as well as other information, such as information from the “survey and inventory” element, available to the public via the internet or other means. For example, the Agency would support funding state and tribal efforts to include detailed location information in the public record such as the street address, and latitude and longitude information for

each site.⁷ States and tribes should ensure that all affected communities have appropriate access to the public record including making it available on-line, in print at libraries, or other community gathering places.

In an effort to reduce cooperative agreement reporting requirements and increase public access to the public record, EPA encourages states and tribes to place their public record on the internet. If a state or tribe places the public record on the internet, maintains the substantive requirements of the public record, and provides EPA with the link to that site, EPA will, for purposes of cooperative agreement funding only, deem the public record reporting requirement met.

C. Long-term maintenance of the public record

EPA encourages states and tribes to maintain public record information, including data on institutional controls, on a long term basis (more than one year) for sites at which a response action has been completed. Subject to EPA regional office approval, states or tribes may include development and operation of systems that ensure long term maintenance of the public record, including information on institutional controls, in their work plans.⁸

VII. USE OF FUNDING

A. Overview

Section 128(a)(1)(B) describes the eligible uses of cooperative agreement funds by states and tribes. In general, a state or tribe may use a cooperative agreement to "establish or

⁷For further information on latitude and longitude information, please see EPA's data standards web site available at http://iaspub.epa.gov/sor_internet/registry/datastds/findadatastandard/epaapproved/latitudelongitude.

⁸States and tribes may find useful information on institutional controls on EPA's institutional controls web site at <http://www.epa.gov/superfund/policy/ic/index.htm>.

enhance" their response programs, including elements of the response program that include activities related to responses at brownfields sites with petroleum contamination.

Eligible activities include, but are not limited to, the following:

- developing legislation, regulations, procedures, ordinances, guidance, etc. that establish or enhance the administrative and legal structure of their response programs;
- establishing and maintaining the required public record described in Section VI of this guidance;
- maintaining and monitoring institutional controls;
- conducting site-specific activities, such as assessment or cleanup, provided such activities establish and/or enhance the response program and are tied to the four elements. In addition to the requirement under CERCLA section 128(a)(2)(C)(ii) to provide for public comment on cleanup plans and site activities, EPA strongly encourages states and tribes to seek public input regarding the priority of sites to be addressed and solicit input from local communities, especially potential environmental justice communities, communities with a health risk related to exposure to hazardous waste or other public health concerns, economically disadvantaged or remote areas, and communities with limited experience working with government agencies. EPA will not provide section 128(a) funds solely for assessment or cleanup of specific brownfields sites; site-specific activities must be part of an overall section 128(a) work plan that includes funding for other activities that establish or enhance the four elements;
- capitalizing a revolving loan fund (RLF) for brownfields cleanup under CERCLA

section 104(k)(3). These RLFs are subject to the same statutory requirements and cooperative agreement terms and conditions applicable to RLFs awarded under section 104(k)(3). Requirements include a 20 percent match (can be in the form of a contribution of money, labor, material, or services from a non-federal source) on the amount of section 128(a) funds used for the RLF, a prohibition on using EPA cooperative agreement funds for administrative costs relating to the RLF, and a prohibition on using RLF loans or subgrants for response costs at a site for which the recipient may be potentially liable under section 107 of CERCLA. Other prohibitions contained in CERCLA section 104(k)(4) also apply; and

- purchasing environmental insurance or developing a risk-sharing pool, indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program.

B. Uses related to “establishing” a state or tribal response program

Under CERCLA section 128(a), "establish" includes activities necessary to build the foundation for the four elements of a state or tribal response program and the public record requirement. For example, a state or tribal response program may use section 128(a) funds to develop regulations, ordinances, procedures, and/or guidance. For more developed state or tribal response programs, “establish” may also include activities that keep their program at a level that meets the four elements and maintains a public record required as a condition of funding under CERCLA section 128(b)(1)(C).

C. Uses related to “enhancing” a state or tribal response program

Under CERCLA section 128(a), "enhance" is related to activities that add to or improve a state or tribal response program or increase the number of sites at which response actions

are conducted under a state or tribal response program.

The exact "enhancement" uses that may be allowable depend upon the work plan negotiated between the EPA regional office and the state or tribe. For example, regional offices and states or tribes may agree that section 128(a) funds may be used for outreach and training directly related to increasing awareness of its response program, and improving the skills of program staff. It may also include developing better coordination and understanding of other state response programs, e.g., RCRA or Underground Storage Tanks (USTs). As another example, states and tribal response programs enhancement activities can include outreach to local communities to increase their awareness and knowledge regarding the importance of monitoring engineering and institutional controls. Other "enhancement" uses may be allowable as well.

D. Uses related to site-specific activities

1. Uses for site-specific activities

States and tribes may use section 128(a) funds for site-specific activities that improve state or tribal capacity. The amount grantees may request for site-specific assessments and cleanups may not exceed 50% of the total amount of funding. A grantee may request a waiver to exceed the 50% of annual funding for site specific activities. In order for EPA to consider the waiver, the total amount of the request may not exceed the grantee's prior year's funding level. The funding request must include a brief justification describing the reason(s) for spending more than 50% of an annual allocation on site-specific activities. An applicant must include the following information in the written justification:

- what site specific activities will be covered by this funding? If known, provide site specific information and describe the development or enhancement of your state/tribal site specific program. Further explain how the community will be (or has been) involved in prioritization of site work and especially those sites where there is a potential or known significant environmental impact to the community;
- how will the core programmatic capacity (i.e., the four elements of a response program) and related activities be maintained in spite of an increase in site-specific work? Grantees must demonstrate that they have adequate funding from other sources to effectively carry out work on the four elements for EPA to grant a waiver of the 50% limit on using 128(a) funds for site-specific activities;
- describe how this shift in funding towards site-specific work is more appropriate for your response program rather than a request for an increase in overall funding; and
- are the sites to be addressed those which the affected community(ies) has requested an assessment (refer to Overview of Funding section of this notice for more information)? Please explain.

EPA Headquarters will determine approval of waivers on the information that is included in the justification along with the request for funding, as well as other information available to the Agency. EPA's Regional

Brownfield Coordinators will inform grantees of the Agency's final decision(s).

2. Uses related to site-specific assessment and cleanup activities

Site-specific assessment and cleanup activities should establish and/or enhance the response program and be tied to the four elements. Site-specific assessments and cleanups must comply with all applicable laws and are subject to the following restrictions:

- a. section 128(a) funds can only be used for assessments or cleanups at sites that meet the definition of a brownfields site at CERCLA section 101(39). EPA encourages states and tribes to use site-specific funding to perform assessment (e.g., phase II and phase III assessments) and cleanup activities that will lead more quickly to the reuse of sites;
- b. absent EPA approval, no more than \$200,000 per site assessment can be funded with section 128(a) funds, and no more than \$200,000 per site cleanup can be funded with section 128(a) funds;
- c. absent EPA approval, the state/tribe may not use funds awarded under this agreement to assess and clean up sites owned or operated by the recipient; and
- d. assessments and cleanups cannot be conducted at sites where the state/tribe is a potentially responsible party

pursuant to CERCLA section 107, except:

- at brownfields sites contaminated by a controlled substance as defined in CERCLA section 101(39)(D)(ii)(I); or
- when the recipient would satisfy all of the elements set forth in CERCLA section 101(40) to qualify as a bona fide prospective purchaser except that the date of acquisition of the property was on or before January 11, 2002.

Subgrants cannot be provided to entities that may be potentially responsible parties (pursuant to CERCLA section 107) at the site for which the assessment or cleanup activities are proposed to be conducted, except:

1. at brownfields sites contaminated by a controlled substance as defined in CERCLA section 101(39)(D)(ii)(I); or
2. when the recipient would satisfy all of the elements set forth in CERCLA section 101(40) to qualify as a bona fide prospective purchaser except that the date of acquisition of the property was on or before January 11, 2002.
3. Uses related to site-specific activities at petroleum brownfields sites

States and tribes may use section 128(a) funds for activities that establish and enhance their response programs, even if their response programs address petroleum contamination. Also, the costs of site-specific

activities, such as site assessments or cleanup at petroleum contaminated brownfields sites, defined at CERCLA section 101(39)(D)(ii)(II), are eligible and are allowable if the activity is included in the work plan negotiated between the EPA regional office and the state or tribe. Section 128(a) funds used to capitalize a Brownfields RLF may be used at brownfields sites contaminated by petroleum to the extent allowed under CERCLA section 104(k)(3).

4. Other Eligible Uses of Funding

Other eligible uses of funds for site-specific related include, but are not limited to, the following activities:

- technical assistance to federal brownfields cooperative agreement recipients;
- development and/or review of quality assurance project plans (QAPPs); and
- preparation and submission of Property Profile Forms and/or entering data into the ACRES database

E. Uses related to activities at “non-brownfields” sites

Costs incurred for activities at non-brownfields sites, e.g., oversight, may be eligible and allowable if such activities are included in the state's or tribe's work plan. These costs need not be incurred in connection with a brownfields site to be eligible, but must be authorized under the state's or tribe's work plan to be allowable. Other uses may be eligible and allowable as well, depending upon the work plan negotiated between the EPA regional office and the state or tribe. *However, assessment and*

cleanup activities may only be conducted on eligible brownfields sites, as defined in CERCLA section 101(39).

VIII. GENERAL PROGRAMMATIC GUIDELINES FOR 128(a) GRANT FUNDING REQUESTS

Funding authorized under CERCLA section 128(a) is awarded through a cooperative agreement⁹ with a state or tribe. The program is administered under the general EPA grant and cooperative agreement regulations for states, tribes, and local governments found in the Code of Federal Regulations at 40 CFR Part 31 as well as applicable provisions of 40 CFR Part 35 Subparts A and B. Under these regulations, the cooperative agreement recipient for section 128(a) grant program is the government to which a cooperative agreement is awarded and which is accountable for the use of the funds provided. The cooperative agreement recipient is the entire legal entity even if only a particular component of the entity is designated in the cooperative agreement award document. Further, unexpended balances of cooperative agreement funds are subject to 40 CFR 35.118 and 40 CFR 35.518 to the extent consistent with this guidance. EPA allocates funds to state and tribal response programs under 40 CFR 35.420 and 40 CFR 35.737

A. One application per state or tribe

Subject to the availability of funds, EPA regional offices will negotiate and enter into section 128(a) cooperative agreements with eligible and interested states or tribes. EPA will accept only one application from each eligible state or tribe.

B. Define the state or tribal response program

States and tribes must define in their work plan the "section 128(a) response program(s)"

⁹A cooperative agreement is an agreement to a state/tribe that includes substantial involvement by EPA on activities described in the work plan which may include technical assistance, collaboration on program priorities, etc.

to which the funds will be applied, and may designate a component of the state or tribe that will be EPA's primary point of contact for negotiations on their proposed work plan. When EPA funds the section 128(a) cooperative agreement, states and tribes may distribute these funds among the appropriate state and tribal agencies that are part of the section 128(a) response program. This distribution must be clearly outlined in their annual work plan.

C. Separate cooperative agreements for the capitalization of RLFs using Section 128(a) funds

If a portion of the section 128(a) grant funds requested will be used to capitalize a revolving loan fund for cleanup, pursuant to section 104(k)(3), two separate cooperative agreements must be awarded, i.e., one for the RLF and one for non-RLF uses. States and tribes may, however, submit one initial request for funding, delineating the RLF as a proposed use. Section 128(a) funds used to capitalize an RLF are not eligible for inclusion into a Performance Partnership Grant (PPG).

D. Authority to manage a revolving loan fund program

If a state or tribe chooses to use its section 128(a) funds to capitalize a revolving loan fund program, the state or tribe must have the authority to manage the program, *e.g.*, issue loans. If the agency/department listed as the point of contact for the section 128(a) cooperative agreement does not have this authority, it must be able to demonstrate that another state or tribal agency does have the authority to manage the RLF and is willing to do so.

E. Section 128(a) cooperative agreements can be part of a Performance Partnership Grant (PPG)

States and tribes may include section 128(a) cooperative agreements in their PPG 69 Fed. Reg. 51,756 (2004). Section 128(a) funds used to capitalize an RLF or purchase insurance or develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program are not eligible for inclusion in the PPG.

F. Project period

EPA regional offices will determine the project period for each cooperative agreement. These may be for multiple years depending on the regional office's cooperative agreement policies. Each cooperative agreement must have an annual budget period tied to an annual work plan. Pre-award costs are subject to 40 CFR 35.113 and 40 CFR 35.513.

G. Demonstrating the four elements

As part of the annual work plan negotiation process, states or tribes that do not have VRP MOAs must demonstrate that their program includes, or is taking reasonable steps to include, the four elements described in Section V. EPA will not fund, in future years, state or tribal response program annual work plans if EPA determines that these requirements are not met or reasonable progress is not being made. EPA may base this determination on the information the state or tribe provides to support its work plan, or on EPA's review of the state or tribal response program.

H. Establishing and maintaining the public record

Prior to funding a state's or tribe's annual work plan, EPA regional offices will verify and

document that a public record, as described in Section VI and below, exists and is being maintained.¹⁰ Specifically:

- states or tribes that received initial funding prior to FY11: Requests for FY12 funds will not be accepted from states or tribes that fail to demonstrate, by the January 31, 2012, request deadline, that they established and are maintaining a public record. (*Note*, this would potentially impact any state or tribe that had a term and condition placed on their FY11 cooperative agreement that prohibited drawdown of FY11 funds prior to meeting public record requirement). States or tribes in this situation will not be prevented from drawing down their prior year funds, once the public record requirement is met, but will be restricted from applying for FY12 funding; and
- states or Tribes that received initial funding in FY11: By the time of the actual FY12 award, the state or tribe must demonstrate that they established and maintained the public record (those states and tribes that do not meet this requirement will have a term and condition placed on their FY12 cooperative agreement that prevents the drawdown of FY12 funds until the public record requirement is met).

I. Demonstration of significant utilization of prior years' funding

States and tribes should be aware that EPA and its Congressional appropriations committees are concerned regarding the amount of unexpended balances of STAG categorical grants. During the allocation process, EPA headquarters places significant emphasis on the utilization of prior years' funding. Unused funds from prior years will be

¹⁰ For purposes of cooperative agreement funding, the state's or tribe's public record applies to that state's or tribe's response program(s) that utilized the section 128(a) funding.

considered in the allocation process. Existing balances of cooperative agreement funds as reflected in EPA's Financial Data Warehouse could support an allocation amount below a grantee's request for funding or, if appropriate, deobligation and reallocation by EPA Regions as provided for in 40 CFR 35.118 and 40 CFR 35.518 . Grantees should include a detailed explanation and justification of funds that remain in EPA's Financial Data Warehouse from prior years (that are related to response program activities or brownfield related activities).

EPA Regional staff will review EPA's Financial Database Warehouse to identify the amount of remaining prior year(s) funds. The cooperative agreement recipient should work, as early as possible, with both their own finance department, and with their Regional Project Officer to reconcile any discrepancy between the amount of unspent funds showing in EPA's system, and the amount reflected in the recipient's records. The recipient should obtain concurrence from the Region on the amount of unspent funds requiring justification by the deadline for this request for funding.

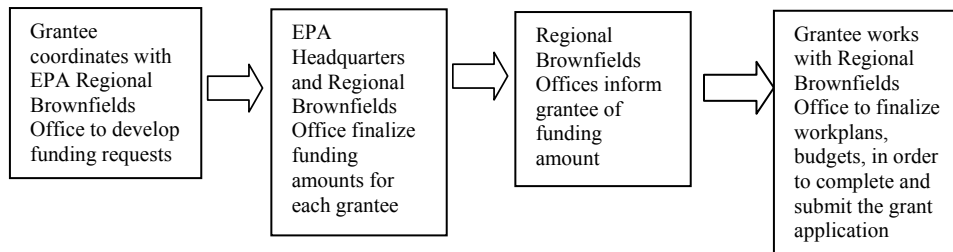
J. Optional: Explanation of overall program impacts of possible funding reductions

Please describe the effects, if any, of a 10% and 20% reduction in your current funding amount on significant activities of your response program. Specifically, where would the decrease in funding be realized (e.g. reduction in staff, decrease in oversight activities, or other impacts to the environment and health of the communities the program serves, etc.) in your program?

K. Allocation system and process for distribution of funds

EPA regional offices will work with interested states and tribes to develop their preliminary work plans and funding requests. Final cooperative agreement work plans

and budgets will be negotiated with the regional office once final allocation determinations are made. Please refer to process flow chart below:



For Fiscal Year 2012, EPA will consider funding requests up to a maximum of \$1.2 million per state or tribe. Please note the CERCLA 128(a) annual program's budget has remained static while demand for funding continues to increase every year¹¹. Therefore, it is likely that the FY12 state and tribal individual funding amounts will be less than the FY11 individual funding amounts.

After the January 31, 2012, request deadline, EPA's Regional Offices will submit summaries of state and tribal requests to EPA Headquarters. Before submitting requests to EPA Headquarters, Regional Offices may take into account additional factors when determining recommended allocation amounts. Such factors include, but are not limited to, the depth and breadth of the state or tribal program; scope of the perceived need for the funding, e.g., size of state or tribal jurisdiction or the proposed work plan balanced against capacity of the program, amount of current year funding, funds remaining from prior years, etc.

After receipt of the regional recommendations, EPA Headquarters will consolidate requests and allocate funds accordingly.

¹¹ FY11 EPA received \$64.9 Million in requests for funding from States and Tribes under CERCLA 128(a). The FY11 enacted budget was \$49.5 Million. The resulting budget shortfall was approximately \$ 15.4 Million.

In FY13 the maximum amount that EPA will consider for a funding request will likely decrease at a rate up to 30% a year, and could decrease at a greater rate depending on enacted Congressional budget amounts and demand for funding.

IX. INFORMATION TO BE SUBMITTED WITH THE FUNDING REQUEST

A. Demonstration of significant utilization of prior years' funding

States and tribes requesting section 128(a) FY12 funds must submit the following information, as applicable, to their regional brownfield contact on or before January 31, 2012. If a grantee wishes to avoid an allocation reduction, when submitting a request for FY12 funds, include a detailed explanation and justification of funds that remain in EPA's financial Data Warehouse from prior years (that are related to response program activities or brownfield related activities).

For those states and tribes that received FY10 or prior section 128(a) funds, you must provide the amount of prior years' funding including FY10 funds that recipients have not received in payments (i.e., funds EPA has obligated for grants that remain in EPA's Financial Data Warehouse). EPA will take into account these funds in the allocation process when determining the recipient's programmatic needs under 40 CFR 35.420 and 40 CFR 35.737.

B. Summary of planned use of FY12 funding

Funding Use	FY11 Awarded	FY12 Requested	Summary of Intended Use (EXAMPLE USES)
<p>All states and tribes requesting FY12 funds must submit a summary of the planned use of the funds with associated dollar amounts. Please provide the request in the following:</p> <p>Establish or enhance the four elements:</p> <ol style="list-style-type: none"> 1. Timely survey and inventory of brownfields sites; 2. Oversight and enforcement authorities or other mechanisms; 3. Mechanisms and resources to provide meaningful opportunities for public participation; 4. Mechanisms or approval of a cleanup plan and verification and certification that cleanup is complete. 	\$XX,XXX	\$XX,XXX	<ol style="list-style-type: none"> 1. Examples: <ul style="list-style-type: none"> • inventory and prioritize brownfields sites 2. Examples: <ul style="list-style-type: none"> • develop/enhance ordinances, regulations, procedures for response programs 3. Examples: <ul style="list-style-type: none"> • develop a community involvement process • fund an outreach coordinator • issue public notices of site activities • develop a process to seek public input from local communities, especially potential environmental justice communities, communities with a health risk related to exposure to hazardous waste or other public health concerns, economically disadvantaged or remote areas, and communities with limited experience working with government agencies to prioritize sites to be addressed 4. Examples: <ul style="list-style-type: none"> • review cleanup plans and verify completed actions
Establish and maintain the public record	\$XX,XXX	\$XX,XXX	<ul style="list-style-type: none"> • maintain public record • create web site for public record • disseminate public information on how to access the public record

Funding Use	FY11 Awarded	FY12 Requested	Summary of Intended Use (EXAMPLE USES)
Enhance the response program	\$XX,XXX	\$XX,XXX	<ul style="list-style-type: none"> • provide oversight of site assessments and cleanups • attend training and conferences on brownfields cleanup technologies & other brownfields topics • update and enhance program management activities • negotiate/oversee contracts for response programs • enhance program management & tracking systems
Site-specific activities <i>(amount requested should be incidental to the workplan, see Section VII.D for more information on what activities should be considered when calculating site specific activities)</i>	\$XX,XXX	\$XX,XXX	<ul style="list-style-type: none"> • perform site assessments and cleanups • develop QAPPs • prepare Property Profile Forms/input data into ACRES database for these sites
Environmental insurance	\$XX,XXX	\$XX,XXX	<ul style="list-style-type: none"> • review potential uses of environmental insurance • manage an insurance risk pool
Revolving loan fund	\$XX,XXX	\$XX,XXX	<ul style="list-style-type: none"> • create a cleanup revolving loan fund
Total funding	\$XXX,XXX	\$XXX,XXX	Performance Partnership Grant? Yes <input type="checkbox"/> No <input type="checkbox"/>

X. TERMS AND REPORTING

Cooperative agreements for state and tribal response programs will include programmatic and administrative terms and conditions. These terms and conditions will describe EPA's substantial involvement including technical assistance and collaboration on program development and site-specific activities. Each of the subsections below summarizes the basic terms and conditions, and related reporting that will be required if a cooperative agreement with EPA is awarded.

A. Progress reports

In accordance with 40 CFR 31.40, state and tribes must provide progress reports as provided in the terms and conditions of the cooperative agreement negotiated with EPA regional offices. State and tribal costs for complying with reporting requirements are an eligible expense under the section 128(a) cooperative agreement. As a minimum, state or tribal progress reports must include both a narrative discussion and performance data relating to the state's or tribe's accomplishments and environmental outputs associated with the approved budget and workplan, and should provide an accounting of section 128(a) funding. If applicable, the state or tribe must include information on activities related to establishing or enhancing the four elements of the state's or tribe's response program. All recipients must provide information relating to establishing or, if already established, maintaining the public record. Depending upon the activities included in the state's or tribe's work plan, an EPA regional office may request that a progress report include:

1. *Reporting environmental insurance.* Recipients with work plans that include funding for *environmental insurance* must report:
 - number and description of insurance policies purchased (*e.g.*, type of coverage provided; dollar limits of coverage; any buffers or deductibles; category and identity of insured persons; premium; first dollar or umbrella; site specific or blanket; occurrence or claims made, etc.);
 - the number of sites covered by the insurance;
 - the amount of funds spent on environmental insurance (*e.g.*, amount

dedicated to insurance program, or to insurance premiums); and

- the amount of claims paid by insurers to policy holders.

2. *Reporting for site-specific assessment or cleanup activities.* Recipients with work plans that include funding for *brownfields site assessment or cleanup* must input information required by the OMB-approved Property Profile Form into the Assessment Cleanup and Redevelopment Exchange System (ACRES) database for each site assessment and cleanup. In addition, recipients must report how they provide the affected community with prior notice and opportunity for meaningful participation as per CERCLA section 128(a)(2)(C)(ii) on proposed cleanup plans and site activities. For example, EPA strongly encourages states and tribes to seek public input regarding the priority of sites to be addressed and solicit input from local communities, especially potential environmental justice communities, communities with a health risk related to exposure to hazardous waste or other public health concerns, economically disadvantaged or remote areas, and communities with limited experience working with government agencies.

3. *Reporting for other site-specific activities.* Recipients with work plans that include funding for *other site-specific related activities* must include a description of the site-specific activities and the number of sites at which the activity was conducted. For example:

- number and frequency of oversight audits of licensed site professional certified cleanups;

- number and frequency of state/tribal oversight audits conducted;
 - number of sites where staff conducted audits, provided technical assistance, or conducted other oversight activities; and
 - number of staff conducting oversight audits, providing technical assistance, or conducting other oversight activities.
4. *Reporting for RLF uses.* Recipients with work plans that include funding for revolving loan fund (RLF) must include the information required by the terms and conditions for progress reporting under CERCLA section 104(k)(3) RLF cooperative agreements.
5. *Reporting for Non-MOA states and tribes.* All recipients without a VRP MOA must report activities related to establishing or enhancing the four elements of the state's or tribe's response program. For each element state/tribes must report how they are maintaining the element or how they are taking reasonable steps to establish or enhance the element as negotiated in individual state/tribal work plans. For example, pursuant to CERCLA section 128(a)(2)(B), reports on the oversight and enforcement authorities/mechanisms element may include:
- a narrative description and copies of applicable documents developed or under development to enable the response program to conduct enforcement and oversight at sites. For example:
 - legal authorities and mechanisms (e.g., statutes, regulations, orders, agreements); and
 - policies and procedures to implement legal authorities; and

other mechanisms;

- a description of the resources and staff allocated/to be allocated to the response program to conduct oversight and enforcement at sites as a result of the cooperative agreement;
- a narrative description of how these authorities or other mechanisms, and resources, are adequate to ensure that:
 - a response action will protect human health and the environment; and be conducted in accordance with applicable federal and state law; and if the person conducting the response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed; and
- a narrative description and copy of appropriate documents demonstrating the exercise of oversight and enforcement authorities by the response program at a brownfields site.

The regional offices may also request other information be added to the progress reports, as appropriate, to properly document activities described by the cooperative agreement work plan.

EPA regions may allow states or tribes to provide performance data in appropriate electronic format.

The regional offices will forward progress reports to EPA Headquarters, if requested.

This information may be used to develop national reports on the outcomes of CERCLA section 128(a) funding to states and tribes.

B. Reporting of program activity levels

States and tribes must report, by January 31, 2012, a summary of the *previous federal fiscal year's* work (October 1, 2010 through September 30, 2011). The following information must be submitted to your regional project officer:

- category(ies) of properties (or sites) that CERCLA 128(a) funds are used for capacity building and/or site-specific activities:

___ Brownfields

___ Underground Storage Tanks/Leaking Underground Storage Tanks

___ Federal Facilities

___ Solid Waste

___ Superfund

___ Hazardous Waste Facilities

___ VCP (Voluntary Cleanup Program, Independent Cleanup Program, etc.)

___ Other _____;

- number of properties (or sites) enrolled in a response program during FY11;
- number of properties (or sites) where documentation indicates that cleanup work is complete and all required institutional controls (IC's) are in place, or not required;
- total number of acres associated with properties (or sites) in the previous bullet; and
- number of properties where assistance was provided, but the property was not enrolled in the response program (OPTIONAL).

Where applicable, EPA may require states/tribes to report specific performance measures

related to the four elements which can be aggregated for national reporting to Congress.

For example:

1. timely survey and inventory - estimated number of brownfields sites in the state or on tribal land;
2. oversight and enforcement authorities/mechanisms - number of active cleanups and percentage that received oversight; percentage of active cleanups not in compliance with the cleanup workplan and that received communications from recipient regarding non-compliance;
3. public participation - percentage of sites in the response program where public meetings/notices were conducted regarding the cleanup plan and/or other site activities; number of requests and responses to site assessment requests; and
4. cleanup approval/certification mechanisms - total number of "no further action" letters or total number of certificate of completions.

(NOTE: where applicable, this reporting requirement may include activities not funded with CERCLA section 128(a) monies, because this information may be used by EPA to evaluate whether recipients without MOAs have met or are taking reasonable steps to meet the four elements of a response program pursuant to CERCLA section 128(a)(2).

C. Reporting of public record

All recipients must report, as specified in the terms and conditions of their cooperative agreement, information related to establishing or, if already established, maintaining the public record, described above. States and tribes can refer to an already existing public record, e.g., website or other public database to meet the public record requirement.

Recipients reporting may only be required to demonstrate that the public record a) exists and is up-to-date, and b) is adequate. A public record may include the following information:

A list of sites at which response actions have been completed including:

- date the response action was completed;
- site name;
- name of owner at time of cleanup, if known;
- location of the site (street address, and latitude and longitude);
- whether an institutional control is in place;
- type of institutional control in place (e.g., deed restriction, zoning restriction, local ordinance, state registries of contaminated property, deed notices, advisories, etc.);
- nature of the contamination at the site (e.g., hazardous substances, contaminants or pollutants, petroleum contamination, etc.); and
- size of the site in acres.

A list of sites planned to be addressed by the state or tribal response program including:

- site name and the name of owner at time of cleanup, if known;
- location of the site (street address, and latitude and longitude);
- to the extent known, whether an institutional control is in place;
- type of the institutional control in place (e.g., deed restriction, zoning restriction, local ordinance, state registries of contaminated property, deed notices, advisories, etc.);
- to the extent known, the nature of the contamination at the site (e.g.,

hazardous substances, contaminants, or pollutants, petroleum contamination, etc.); and

- size of the site in acres

D. Award administration information

1. Subaward and executive compensation reporting

Applicants must ensure that they have the necessary processes and systems in place to comply with the subaward and executive total compensation reporting requirements established under OMB guidance at 2 CFR Part 170, unless they qualify for an exception from the requirements, should they be selected for funding.

2. Central Contractor Registration (CCR) and Data Universal Numbering System (DUNS) Requirements

Unless exempt from these requirements under OMB guidance at 2 CFR Part 25 (e.g., individuals), applicants must:

- a. register in the CCR prior to submitting an application or proposal under this announcement. CCR information can be found at <https://www.bpn.gov/ccr/>;
- b. maintain an active CCR registration with current information at all times during which it has an active federal award or an application or proposal under consideration by an agency, and
- c. provide its DUNS number in each application or proposal it submits to the agency. Applicants can receive a DUNS number, at no cost, by visiting the D&B website at: <https://iupdate.dnb.com/iUpdate/companylookup.htm>.

Failure to comply with these requirements will affect the applicant's ability to receive any funding.

3. *Use of funds*

An applicant that receives an award under this announcement is expected to manage assistance agreement funds efficiently and effectively, and make sufficient progress towards completing the project activities described in the work-plan in a timely manner. The assistance agreement will include terms/conditions implementing this requirement.

REGIONAL STATE AND TRIBAL BROWNFIELDS CONTACTS

REGION	STATE	TRIBAL
1 CT, ME, MA, NH, RI, VT	James Byrne 5 Post Office Square, Suite 100 (OSRR07-2) Boston, MA 02109-3912 Phone (617) 918-1389 Fax (617) 918-1291	AmyJean McKeown 5 Post Office Square, Suite 100 (OSRR07-2) Boston, MA 02109-3912 Phone (617) 918-1248 Fax (617) 918-1291
2 NJ, NY, PR, VI	John Struble 290 Broadway, 18th Floor New York, NY 10007 Phone (212) 637-4291 Fax (212) 637-4211	John Struble 290 Broadway, 18th Floor New York, NY 10007 Phone (212) 637-4291 Fax (212) 637-4211
3 DE, DC, MD, PA, VA, WV	Janice Bartel 1650 Arch Street (3HS51) Philadelphia, PA 19103 Phone (215) 814-5394 Fax (215) 814-3274	
4 AL, FL, GA, KY, MS, NC, SC, TN	Nicole Comick-Bates 61 Forsyth Street, S.W, 10TH FL (9T25) Atlanta, GA 30303-8909 Phone (404) 562-9966 Fax (404) 562-8788	Cindy J. Nolan 61 Forsyth Street, S.W, 10TH FL (9T25) Atlanta, GA 30303-8909 Phone (404) 562-8425 Fax (404) 562-8788
5 IL, IN, MI, MN, OH, WI	Jan Pels 77 West Jackson Boulevard (SE-7J) Chicago, IL 60604-3507 Phone (312) 886-3009 Fax (312) 692-2161	Jane Neumann 77 West Jackson Boulevard (SE-7J) Chicago, IL 60604-3507 Phone (312) 353-0123 Fax (312) 697-2649
6 AR, LA, NM, OK, TX	Amber Perry 1445 Ross Avenue, Suite 1200 (6SF) Dallas, TX 75202-2733 Phone (214) 665-3172 Fax (214) 665-6660	Amber Perry 1445 Ross Avenue, Suite 1200 (6SF) Dallas, TX 75202-2733 Phone (214) 665-3172 Fax (214) 665-6660
7 IA, KS, MO, NE	Susan Klein 901 N. 5th Street (SUPRSTAR) Kansas City, KS 66101 Phone (913) 551-7786 Fax (913) 551-9786	Susan Klein 901 N. 5th Street (SUPRSTAR) Kansas City, KS 66101 Phone (913) 551-7786 Fax (913) 551-9798
8 CO, MT, ND, SD, UT, WY	Christina Wilson 1595 Wynkoop Street (EPR-B) Denver, CO 80202-1129 Phone (303) 312-6706 Fax (303) 312-6065	Barbara Benoy 1595 Wynkoop Street (8EPR-SA) Denver, CO 80202-1129 Phone (303) 312-6760 Fax (303) 312-6962
9 AZ, CA, HI, NV, AS, GU	Eugenia Chow 75 Hawthorne St. (SFD-6-1) San Francisco, CA 94105 Phone (415) 972-3160 Fax (415) 947-3520	Glenn Kistner 75 Hawthorne St. (SFD-6-1) San Francisco, CA 94105 Phone (415) 972-3004 Fax (415) 947-3520
10 AK, ID, OR, WA	Deborah Burgess 300 Desmond Dr., SE, Suite 102 (WOO) Lacey, WA 98503 Phone (360) 753-9079 Fax (360) 753-8080	Deborah Burgess 300 Desmond Dr., SE, Suite 102 (WOO) Lacey, WA 98503 Phone (360) 753-9079 Fax (360) 753-8080

XI. STATUTORY AND EXECUTIVE ORDER REVIEWS:

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and is therefore not subject to OMB review. Because this action is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub.L. 104-4). In addition, this action does not significantly or uniquely affect small governments. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999).

Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). This action does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress

and to the Comptroller General of the United States. Because this final action does not contain legally binding requirements, it is not subject to the Congressional Review Act.

Dated: November 22, 2011

David R. Lloyd,
Director, Office of Brownfields and Land Revitalization,
Office of Solid Waste and Emergency Response.

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